No. 87.

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OCTOBER TERM, 1899.

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THE BALTIMORE AND POTOMAC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES EMMET CUMBERLAND, AN INFANT, BY HIS NEXT FRIEND, CHARLES J. CUMBERLAND.

ON WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF OF ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

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Brief of Argument on Behalf of Plaintiff in Error.

INTRODUCTION.

This action, begun in the supreme court of the District of Columbia, involves the right of the infant plaintiff, who was twelve (12) years and four (4) months old at the time of the occurrence complained of, to recover damages for personal injuries inflicted upon him by the alleged negligence of the defendant company. The plaintiff was a street lamp lighter by occupation, and for more than a year prior

to the accident had, by the direction of his father, who brings this suit as his next friend, been engaged in lighting street lamps in the vicinity of the defendant company's tracks on Maryland avenue S. W., in the city of Washington. On the evening of the accident, December 10, 1894, about dark, the weather being "misty," according to some of the witnesses, and "rainy, foggy, and very cold," according to others, the plaintiff, in the course of his usual rounds, having lighted a lamp on the south side of Maryland avenue, midway between Thirteen-and-a-half and Fourteenth streets S. W., started to cross Maryland avenue for the purpose of lighting a lamp directly opposite on the north side of the street. At this point there was no crossing for pedestrians or vehicles, and the street on either side of the defendant company's right of way was separated therefrom by curbs which projected eight inches above the surface of the adjacent street or roadway. These curbs were distant about five feet from the outer rails of the main tracks on either side, and the tracks themselves were carried on an elevated structure eighteen inches higher than the top of the curbs, or two feet two inches higher than the surface of the street. Having crossed over a spur or side track and come within the curb line upon the company's right of way, which was separated from the street roadway, as above stated, plaintiff climbed upon the elevated structure in front of an advancing train and *just as he stepped upon the track* was struck, knocked down, and run over, and the injuries complained of resulted.

The engine drawing the train was backing into the city—that is, having its tender in front. On the forward end of the tender was swung a hand signal lantern of the kind usually used for such purpose, and at the time of the accident it was burning brightly. The engineer and fireman were keeping their accustomed watch on the tracks ahead, and testified that the engine bell was rung, the engine reversed, and the power brakes put on as soon as plaintiff's intention to cross the tracks was suspected, and, further, that

the train immediately before the accident was moving at the rate of eight to ten miles an hour only,—considerably less than was permitted by the municipal regulations.

The engineer testified that when he was between Fourteenth street and the place where the accident happened he saw the form of a person moving at a brisk walk in the direction of the tracks about fifteen feet away from them and about fifty or sixty feet in front of the train. He could not tell whether it was a man or boy. When in the neighborhood of thirty feet away he saw he was coming so near the track that he thought probably he was going to walk on it. He then reversed the engine and applied the brake to stop, and the train was brought to a standstill within the distance of eighty or ninety feet.

The fireman testified that when he first saw the boy "he was approaching the track in a brisk walk, and was about fifteen or twenty feet from the track, making his way north. He appeared to be looking across towards the moving train on the south-bound main track. He was carrying some object (a ladder). He saw him put his foot on the end of the ties, and he (witness) called the engineer's attention by 'hollering.'"

A switchman and a by-stander, who were near the scene of the accident, seeing the boy approach the tracks and apparently about to cross in front of the advancing train, "hollered" and otherwise sought to attract his attention and warn him of his peril, but without effect.

The plaintiff made no attempt to prove that the defendant and its servants did not do everything possible to be done to obviate the accident from the moment there was reasonable ground to believe that the plaintiff was about to venture upon the track.

Defendant proved by positive uncontradicted evidence that its servants in charge of the engine and stationed in the immediate vicinity of the scene of the accident did everything in their power to prevent the occurrence.

Under these circumstances it is submitted as matter of law that the plaintiff was a trespasser upon the tracks of the defendant and is without legal right to recover against it for injuries inflicted by the passing train. Railroad companies owe to trespassers upon their tracks no duty save that of refraining from inflicting upon them wanton and wilful injuries.

STATEMENT OF THE CASE.

It appears from the record (5–30), which contains all the evidence given on the trial (30), that at the time of the accident, viz., December 10, 1894, Charles J. Cumberland, the father and next friend of the infant plaintiff, together with said plaintiff, was residing at No. 228 thirteen-and-a-half street S. W., in this city. The father was a street lamplighter in charge of a large route, and, being in ill health and afflicted with failing eyesight, required his son, the plaintiff, to assist him in lighting the lamps (15), assigning to the boy that portion of the route which was about the railroad tracks, and reserving for his own attention other portions situated in a less dangerous locality (14, 16). For a year or more prior to the accident plaintiff had been attending to the lamps on the portion of the route so assigned to him (8).

Plaintiff was born August 26, 1882 (8), and at the date of the accident was within a few days of being twelve years and four months old. About 5 o'clock in the afternoon of the day of the accident, having lighted a lamp situated in the middle of the square between Thirteen-and-a-half and Fourteenth streets, on the south side of Maryland avenue (6, 11), it being the last lamp on that side of the avenue he had to light (9), he started to cross the avenue to light the next light, which "was across the street from this (last) one—right straight across" (8). At this point it appears that there was an unobstructed view of the tracks for several hundred feet in both directions, and particularly in the direction of the

Long bridge (17, 26), and there was no obstacle between the plaintiff and the train that struck him (28). The plaintiff testified that when about twenty-five feet from the south track he looked in both directions (6, 7) for approaching trains. He saw an outbound passenger train on the northernmost track (7) and waited for it to pass, then proceeded on his way across the avenue toward the next lamp, and the next thing he remembered he was lying in bed in a hospital, with his arm cut off (8). He did not see the train that struck him, nor did he hear any warning bells or any one call out to him (10). He did not see the engine that inflicted the injuries upon him nor hear its approach, and he was struck just as he stepped upon the track (13, 25, 28).

The defendant proved, without any attempt on plaintiff's part at contradiction, that its right of way on Maryland avenue between the streets above designated was marked and separated from the street roadway by curbs on either side of its main tracks (19); that these curbs projected about eight inches above the surface of the roadway; that at Thirteen-and-a-half street the tracks and curbs are both flush with the level of the street, but midway of the square between Thirteen-and-a-half and Fourteenth streets "the tracks are a foot and a half above the curb, making them two feet two inches above the roadway" (20). At the time of the accident the crossing gates at the Thirteen-and-a-half-street crossing, on both sides, were down (27), and the lights in the neighborhood were sufficient to render objects readily visible (28, 29).

The engineer, Bush, testified that he saw the form of a person approaching the tracks, and when he approached so near that it seemed probable "he was going to walk on it" he "reversed the engine and applied the brake to stop (11, 21) and rang the bell" (22). Both witness and the fireman were "watching where they were going" (21). The train was moving at the rate of eight or ten miles an hour (21), and came to a stop within 80 or 90 feet (22). The fire-

man, Maddox, corroborated the testimony of the engineer (23, 24), and further stated that there was a hand lamp on the advancing end of the tender that gave a good light.

Counsel for the plaintiff offered in evidence police regulations in force in the District of Columbia at the time of the accident, requiring—

> 1. That "whenever the grade of a steam railroad track is approximately even with the adjacent surface" the line of the road shall be securely closed on both sides with a substantial fence.
>
> 2. That "between sunset and sunrise of each day, a headlight, or other equivalent reflecting lantern," * * * shall be displayed upon the advancing end of every train of steam railroad cars * * * when moving in the District of Columbia; and
>
> 3. "Steam cars * * * shall not move upon any street or avenue at a greater rate of speed than twelve miles an hour." * * *

The trial justice, despite the objection of defendant's counsel, permitted plaintiff to prove that at the time of the accident the line of the railroad at the point of accident was not protected by a fence, though one could have been constructed along the north side of the tracks and actually was so constructed after the accident and before the trial; to all of which defendant duly excepted (20, 21).

Both sides having rested, defendant moved the court, upon all the evidence, to instruct the jury to return a verdict in its favor, which motion was overruled and an exception noted (30).

Thereupon the plaintiff prayed the court to instruct the jury as follows:

> 1. The jury are instructed that if they find that the injuries received by the plaintiff on the evening of the 10th of December, 1894, by being run over by a loco-

motive on the defendant's railroad track on Maryland avenue, in the city of Washington, were caused by negligence of some person or persons in the employ of the defendant company, then the plaintiff is entitled to a verdict, unless the jury further find from the evidence that the plaintiff's own negligence contributed to the injury; and in determining whether the injury was caused by the negligence of the defendant's employés or any of them the jury have a right to take into consideration the facts (1) that the railroad tracks at the point where the accident occurred were not protected by a fence, as required by the regulation of the District Commissioners, which is in evidence; (2) whether the light at the front end of the train was substantially such a light as required by the regulation of the District Commissioners given in evidence or such a light as was requisite to give proper warning of the approach of the train; (3) the distance passed over by the train after it struck the plaintiff before it was brought to a stop, and (4) all the evidence in the case tending to show whether or not the persons in charge of the engine drawing the train were keeping a proper lookout, and the jury will consider all the evidence in the case bearing upon these questions.

2. In considering the question whether the plaintiff was guilty of contributory negligence the jury are instructed that the rule of the law in regard to the negligence of an adult and the rule in regard to that of an infant of tender years are quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly and cannot be visited on another. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than of one of seven, and of a child of seven less than one of twelve or fifteen. The caution required is according to the maturity and capacity of the child. That is to be determined in this case by the circumstances of this particular case.

These prayers, over defendant's objections, were granted by the court, and exceptions to such rulings were duly noted (31).

The defendant then prayed the court to instruct the jury as follows (22):

> 2. If the jury shall be satisfied from the evidence that the plaintiff was a dull boy mentally, and that he was not as bright or mentally capable of taking care of himself as boys of his age usually are, and that his father sent him to light gas lamps in the locality where the accident occurred, and that it was necessary in the performance of such work to cross over several railroad tracks of the defendant after or about nightfall, and that in attempting to cross such railroad tracks at the time in question, not at a crossing, but between 13½ and 14th streets, the plaintiff received the injury complained of, he cannot recover, and the verdict must be for the defendant.
>
> 4. If the jury shall be satisfied from the evidence that a lighted lantern was at the time of and before the accident hanging upon the end of the tender approaching towards and nearest the plaintiff, and that the bell of the engine was kept ringing from the time the engine left "Long bridge" to the time of the accident, and that several of the employés of the defendant called to the plaintiff and warned him in a voice loud enough to be heard by him before he stepped on the track in front of the advancing train, then and in that case the plaintiff, on his declaration in this cause, cannot recover, and the verdict must be in favor of the defendant.
>
> 6. If the jury shall be satisfied from the evidence that a lighted lantern was suspended on the end of the engine which was being "backed" into the city before and at the time of the accident, then and in that case it is immaterial, under the declaration in the case, whether or not such lighted lantern fulfilled the requirements of the police regulations on that subject.

each of which prayers was denied by the court, and exceptions to such rulings were duly noted.

Thereupon the court voluntarily and of its own motion, after reading to the jury plaintiff's prayer numbered one (1), in form as above set forth, instructed the jury as follows (34):

"You will see, gentlemen, that that instruction recites four distinct suggestions, which you may consider in determining whether the defendant was guilty of negligence. The first one relates to the question of the fence. It is admitted that there was no fence here at this point. The regulation of the District Commissioners, which is in evidence before you, requires generally that there shall be a fence. * * * In determining whether the absence of the fence is negligence (on part of defendant) you are to consider that the Commissioners required it, and that they had the right to require it, and that it was not there (34). * * * If you think it was impracticable to build a fence there, and that they could not manage the road reasonably with a fence there, then it would not be negligence in not having it there, although the District Commissioners' regulations required it. * * * It is for you to say whether the absence of the fence is negligence under the circumstances of this case" (35).

"The next point that is submitted to your consideration on the question of negligence of the defendant is whether the light at the front end of the train was substantially such a light as was required by the regulations of the District Commissioners" (35). * * *

"And so as to the question of the distance that was passed over by the train after it struck the plaintiff. You first have to ascertain how far the train did go after it struck him, and then consider that fact after you have found it upon the question of negligence as to whether it satisfies you that they were guilty of negligence in running the train because of the distance that the train ran after it struck the boy" (35).

"And lastly, as to the evidence tending to show whether the persons in charge of the engine drawing the train were keeping a proper lookout; that is for your consideration also" (35). * * *

To all of which defendant duly noted exceptions (39, 41).

The jury returned its verdict in favor of the plaintiff for $8,000 (4), and defendant's motion for a new trial having been overruled, judgment was entered accordingly (4).

Upon appeal to the Court of Appeals of the District of Columbia this judgment was affirmed (50).

ASSIGNMENT OF ERRORS.

1. Upon the whole evidence the verdict should have been in favor of the defendant, and the refusal of the trial justice so to instruct the jury was erroneous (30).

In this connection, the refusal of the trial justice to grant defendant's second prayer (32) and the granting of plaintiff's second prayer (31) is also assigned as error.

2. It was error on the part of the trial justice to refuse to instruct the jury as requested in defendant's fourth and sixth prayers (32), the variance between the allegations of the declaration and the proof rendering the requests for such instructions proper.

3. Plaintiff's first prayer, as granted and given to the jury, was improper in form and bad in substance, as was also so much of the general charge of the court given in explanation thereof as is above set forth ; all of which is also assigned for error.

ARGUMENT.

Upon the facts disclosed by the record, and in the absence of any evidence tending to show that the injuries complained of were inflicted by the defendant or its servants wantonly or maliciously, the jury should have been instructed to return its verdict for the defendant.

It is settled that a railroad company owes no duty to a trespasser upon its tracks or premises other than that which every person owes to another—that is, to refrain from inflicting upon him a willful or malicious injury. If a person be seen lying upon the track, in season to stop the train, the company is not warranted in running him down simply because he is a trespasser there, but it is bound to use all care to prevent the injury if possible. If, after becoming aware of the trespasser's presence, the engineer fails to exert every reasonable effort to prevent the infliction of injury upon him, the company may rightfully he held answerable, but *except at highway or street crossings* the company's right to the use of its tracks and premises, including its right of way, is exclusive, and its agents and servants have the right to assume that they are clear. It is not bound to anticipate that persons will violate its property rights and go upon its tracks, and owes no duty to provide for the safety of such trespassers, and this rule is as applicable to the case of an infant trespasser as to that of an adult. The rule thus broadly stated is subject perhaps to some modification or exception where the tracks are laid in and form a part of the streets of a city, permitting the ready passage over them of pedestrians and vehicles, as well as trains of cars, but such exception has no place in this case, where it plainly appears that at the point where plaintiff attempted to cross

the tracks there was no established crossing, and the tracks were elevated more than two feet above the surface of the adjacent roadway or street, and further separated therefrom by heavy curbs sunk into the roadway about five feet outside of the outer rails and projecting eight inches above the surface of the street.

Plaintiff was well acquainted with the locality and the relative position of the defendant's tracks and the street at that point. He knew the dangers incident to the crossing which he intended to make, and testified that he looked both ways before stepping upon the track. He saw a south-bound passenger train moving out on the track farthest from him and waited for it to pass, but failed to see an incoming train on the track nearest to him, though no obstacle interposed between him and it to obscure his view. In addition to looking he testified he also listened, but failed to hear the noise of the approaching work-train. He climbed upon the elevated structure supporting the tracks and was at once struck and run over by the latter train.

In excuse of plaintiff's conduct it was sought to be proved that defendant failed to display a proper headlight and neglected to ring the engine bell, but even had defendant failed in such particulars, and assuming for the moment that the tracks had been on a level with the surface of the street, the language used by this court in disposing of the case of Railroad Company *vs.* Houston (95 U. S., 697, 702) would seem to end any contention of liability based thereon. There it was said :

> "Negligence of the company's employés in these particulars" (failure to whistle or ring the bell) "was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted

to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant."

This language was quoted with approval in the recent case of Northern Pacific R. R. Co. *vs.* Freeman (174 U. S., 379, 383), where it was also said that—

"When it appears that if proper precautions were taken they could not have failed to prove effectual, the court has no right to assume, especially in the face of oral testimony (to the contrary), that such precautions were taken. * * *

"If, in this case, we were to discard the evidence of the three witnesses entirely, there would still remain the facts that the deceased approached a railway crossing well known to him; that the train was in full view; that, if he had used his senses, he could not have failed to see it; and that, notwithstanding this, the accident occurred. Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look; or if he looked, he did not heed the warning, and took the chance of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence."

In Cullen *vs.* Railroad Company (8 App. D. C., 69), where the plaintiff was between 14 and 15 years old at the time of the accident, it was said:

"Whatever may have been the negligence of the defendant railroad company in failing to enclose its tracks with a fence, as would seem to have been required by law; or in leaving a dangerous hole or excavation in its tracks; or in running its engine at an unlawful rate of speed, if it did so run it on this occasion; or in its failure to ring the bell or otherwise to give notice of the approach of the engine; or in the failure of the engineer to keep a proper lookout in the direction in which his engine was moving, *it is very*

evident that there was contributory negligence on the part of the unfortunate victim of the accident, which wholly precludes any recovery by the plaintiff in this action, unless it is made to appear that the deceased was in some way relieved from the legal consequences of his own negligence."

In Johnson *vs.* B. & M. R. R. Co. (125 Mass., 75), where the plaintiff had been injured through the negligence of the defendant while crossing its tracks at a place not a regular crossing, it was said that as the plaintiff might "have crossed the tracks at a highway crossing, he is a trespasser, and cannot, in the absence of evidence that the negligence *was willful*, maintain an action for the injury, although the defendant's platforms extend between two highways crossing the tracks, and people had been accustomed to pass from the station on one railroad to that on the other at that point without objection by the corporation."

In Nicholson *vs.* Erie R. R. Co. (41 N. Y., 525), plaintiff's intestate was run over and killed by defendant's cars while he was crossing the tracks not at a public crossing, although persons had been accustomed to cross there without objection; it was held that the action could not be maintained, and so in the case of Mason *vs.* Missouri Pac. R. R. Co. (27 Kan., 83), where plaintiff's wife was injured by defendant's cars while walking over an elevated trestlework which carried defendant's tracks across a creek within the city limits, it was said that—

> "As there was no attempt to show that either the injured party or any other person was invited by the company to cross or travel upon the structure over the creek, or that the injured party was upon the structure with the consent of the company, the fact that other parties had crossed upon it did not make it less dangerous or less negligent for the wife of the plaintiff to attempt to do so. * * * The embankment and the

trestle-work are so much elevated above the street, and are so erected for the purpose of operating thereon cars and engines only, as to apparently forbid foot passengers crossing the creek at this place." * * *

And the right to recover damages from the company for her injuries was denied.

In Union Pacific R. R. Co. *vs.* Rollins (5 Kan., 98) it was held that in the case of trespassers the company is liable only for negligence so gross as to amount to wantonness, and in Baltimore, &c., R. R. Co. *vs* Depew (40 Ohio St., 121) it was said that the negligence causing the injury must have been willful, otherwise plaintiff cannot recover.

In Cauley *vs.* Railway Co. (95 Penna. St., 398) it is said that—

"Except at street crossings, where the public has a right of way, a railroad company has the right to a clear track, and it owes no duty to trespassers, whether they be aduits, minors, or children of tender years.

"We live in an age of steam and rapid development. The world demands rapid transportation. Increased speed involves increased danger. Holding railway corporations to a strict responsibility for negligence, it is our duty to give them a clear track. This rule is not only proper in itself, but is necessary for the preservation of life. Its propriety is no longer a subject for discussion."

That such rule is applicable to trespassers upon railroad tracks within city limits, but not imbedded in or level with the city streets, is aptly illustrated by several well-considered cases.

In Glass *vs.* M. & C. R'y Co. (94 Ala., 582), wherein was involved the right to recover for the death of a woman who, while walking along defendant's tracks in the streets of a

populous city, was killed by being run over by one of defendant's trains, it was held that a person walking upon a railway track was a trespasser, and—

"Such an one is essentially and at all times a trespasser, if he be not there by the sanction of the company; and he is as much a trespasser whether he stop and look and listen before going on the track or not, nor is his attitude as trespasser relieved by the utmost diligence and care to avoid injury. In all reason and by every analogy which the law affords he must act upon his own peril; the company owes him no duty except refraining from willful or wanton injury after his presence and peril become known. And this doctrine applies as well to densely populated neighborhoods as to the country; to the streets of a city or a town and to the solitudes of the plains and forests."

Where a railroad track running along a city street is not incorporated therewith and imbedded therein so as to be at the same level as the roadway, "the public has no more right to use it than if it were not in a street at all."

"And the mere fact that persons living in the neighborhood have customarily used the railway track as a footway, without objection by the company, does not alter the duty of the company toward such persons. They are simply trespassers.

"In the case at bar the plaintiff, being wrongfully at the place where she was injured, was a naked trespasser, wholly regardless of any precautions she may have taken before going on the track, or while proceeding thereon. Her negligence and wrong in being there would, as a matter of law, and to be so declared by the court, be a complete defense in this case, so far as defendant's liability is attempted to be rested on the mere negligence of its employés."

Glass *vs.* R. R., *supra.*

So in Montgomery *vs.* Ala. R. R. Co. (97 Ala., 305) where a man walking along a railroad track in an alley of a town was killed by the defendant's train, it was held that as the track was not so imbedded in the ground as to form part of the roadway, the plaintiff was a trespasser on defendant's

property at the time of the accident, and consequently the defendant owed him no duty until it became aware of his presence, and there being no evidence of wanton recklessness on the part of the defendant, the plaintiff could not recover.

In L. & N. R. R. Co. *vs.* Hairston (97 Ala., 351) it was held that:

If a railway track is in a public road or street and so incorporated therewith as to form part of the roadway itself, as, for instance, where no part of the track or road-bed of the railway is above the surface of the street and only the rails are visible, and they on a level with the street, thus inviting the public to use the track of the railway as a part of the street, a person may have the right to walk thereon if he use due care; but one who walks along the track of a railroad which is not imbedded in and does not form part of the public streets of a town is a trespasser.

And this principle is stated in many other cases in the Alabama courts which are referred to and relied on in the cases here cited.

To like effect are the following cases:

Railway Company *vs.* Goldsmith, 47 Indiana, 43.
McLaren *vs.* Railroad Co., 83 Indiana, 319.
Palmer *vs.* Railroad Co., 112 Indiana, 250.
Dull *vs.* Railroad Co., 52 N. E. Rep., 1013.
Tenenbrock *vs.* Railway Co., 59 California, 269.
Toomey *vs.* Railway Co., 86 California, 374.
Masser *vs.* Railway Co., 68 Iowa, 602.
Galena, &c., R'y Co. *vs.* Jacob, 20 Illinois, 478.
Ill. Cent. R'y Co. *vs.* Godfrey, 71 Ill., 500.
Same *vs.* Hetherington, 83 Ill., 510.
Railway Co. *vs.* Zoffinger, 10 Ill. App., 252.
Moore *vs.* Wabash R'y Co., 84 Missouri, 481.
Dahlstrom *vs.* Railway Co., 96 Missouri, 99.

Barker *vs.* Railway Co., 98 Missouri, 50.
Candelaria *vs.* Atch., Top. & S. F. R'y Co. (New Mex.), 27 Pac. Rep., 497.
B. & O. R. R. Co. *vs.* State, 62 Maryland, 479.
Johnson *vs.* B. & M. R. R. Co., 125 Massachusetts, 75.
Wright *vs.* B. & M. R. R. Co., 129 Massachusetts, 440.
Morrisey *vs.* Eastern R. R. Co., 126 Massachusetts, 377.
Mugford *vs.* B. & M. R. R. Co., 52 N. E. Rep., 1078.
Flower *vs.* Penn. R. R. Co., 69 Penna. St., 210.
Duff *vs.* Railroad Co., 91 Penna. St., 458.
Railroad Co. *vs.* Schwindling, 101 Penna. St., 258.
McMullen *vs.* Railroad Co., 132 Penna. St., 107.
Cauley *vs.* Railway Co., 95 Penna. St., 398.
Moore *vs.* Penna. R. R. Co., 99 Penna. St., 301.
Beers *vs.* Railway Co., 19 Connecticut, 566.
Nolan *vs.* Railway Co., 53 Connecticut, 461.
Spicer *vs.* C. & C. R'y Co., 34 W. Virginia, 514.
Cristy *vs.* Railway Co., 35 W. Virginia, 117.
State *vs.* B. & O. R'y Co., 16 Atl. Rep., 210.
Johns' Adm'r *vs.* L. & N. R. R. Co., 10 S. W., 417.
May *vs.* Central R'y of Ga., 4 S. E. Rep., 330.

and many other cases too numerous for citation here.

It is immaterial whether the person injured while trespassing upon railroad tracks be an adult or infant of tender years. The rule above established applies with equal force in either case and as certainly bars a recovery.

In *Moore vs. Penna. R. R. Co.* (99 Pa. St., 301) an intelligent boy ten years old was walking on the ends of the sleepers of defendant's track *laid in a public street in a populous neighborhood.* There was an ample sidewalk on each side of the track. He was struck and killed by a rapidly passing train, and a nonsuit was sustained.

Per Curiam: "Of course, in such circumstances he was a trespasser, and not only put himself in peril by his rashness but also endangered the safety of any passing trains and the lives of passengers. We have so frequently held that in such circumstances there can be no recovery, that it is unnecessary to quote the authorities. As the testimony was undisputed it was the duty of the court to pass upon it, which they did by directing a nonsuit. In this there was no error. The circumstance that the trespasser in this instance was a boy of ten years of age cannot affect the application of the rule. The defendant owed him no greater duty than if he had been an adult. They are not subject to an obligation to take precautions against any class of persons who may walk along their tracks."

In Phila., &c., R. R. Co. *vs.* Hummell (44 Penna. St., 375), where the infant injured was but seven years of age, it was said:

"If the use of a railroad track is exclusively for its owners or those acting under them; if others have no right to be upon it and are wrong-doers whenever they so intrude, the company and its servants are under no obligations to take precautions against possible injuries to those intruding. Ordinary care such companies must be held to, but they have a right to act upon the presumption that those in the vicinity will not trespass upon the right of a clear track and that even children of a tender age will not be there—for though they are personally irresponsible, they cannot be upon the railroad without a culpable violation of duty by their parents or guardians. Precaution is a duty only so far as there is reason for apprehension. No one can complain of want of care in another where care is only rendered necessary by his own wrongful act."

In *Dull vs. Railroad Co.* (Ind. Sup. Ct., 1898; 52 N. E. Rep., 1013) a child seven years of age wandering upon railway tracks in the city of Muncie, Indiana, was injured by a railway train moving at a speed in excess of that permitted by the city ordinances. It was there said:

"That a child over seven years of age and of sufficient intelligence to know the difference between danger and

safety is a person *sui juris* so as to be chargeable with contributory negligence resulting in her being struck by a train; and one who has wandered upon a railway track, though but seven years old, is a trespasser, for injuries to whom the railroad company is not liable when such injuries were caused merely by its negligence."

In *Railroad Co. vs. Bradford* (Ind. Sup. Ct.; 49 N. E. Rep., 388) it appeared that a child of two years of age had wandered upon the defendant's unfenced tracks in the city of Washington, Indiana, and was there injured.

Held, that a child two years of age is *non sui juris*, but its age will not prevent its becoming a trespasser upon a railroad. A statute requiring cautionary signals from trains approaching street crossings was intended solely for the protection of persons approaching such crossings, and has no application to a child trespassing at a distance therefrom, though if such signals had been given they might have averted the accident.

In the case of *Masser vs. Railway Co.* (68 Iowa, 602) it appeared that a boy eleven years old had been injured while trespassing upon certain railroad tracks within the limits of the city of Iowa. It was held that one who walks or plays or lounges upon the track of a railway is a trespasser; and when one who is trespassing upon the track of a railroad company is injured by a passing train he cannot recover on account of any negligence of the company, except negligence of its employees in not trying to avoid the accident *after* discovering the danger, and the mere fact that such train at the time of the accident was running at a rate faster than allowed by a city ordinance does not *per se* alter the rights of the parties.

"And a boy *eleven years* old knows as well as an adult what a railroad is, and the use to which it is put, and the consequence to a person who should be struck by a passing train, and is not of such tender years as not to be charge-

able with contributory negligence. It seems not improbable that this boy might have been discovered a little sooner, but no locomotive engineer is bound to watch out for trespassers upon the track. The company does not owe trespassers that kind of care. This has been settled by repeated adjudications.

"The general rule that persons walking on a railroad track or so near as to receive injury are guilty of carelessness is a healthy rule, and the practice of walking on them is not to be protected and encouraged by frittering the rule away."

In *Morrissey vs. Eastern R. R.*, 126 Mass., 377, a child four years old was killed by a train of the defendant. There was evidence to show that at the point of the accident there existed a foot path which was in common use; that the dangers incident to the use of this path had been complained of to an agent of the company; also that the approaching train gave no warning signal either by bell or whistle.

It was there held that "the plaintiff at the time of the accident was a mere intruder and trespasser upon the railroad track. No inducement or implied invitation to him to enter upon it had been held out. He was neither a passenger nor on his way to become one, but was there merely for his own amusement and was using the track as a playground. The defendant corporation owed him no duty except the negative one not maliciously or with gross carelessness to run over him."

In *Wright vs. Railroad Co.* (142 Mass., 296) a child seven years old was injured while crossing the defendant's tracks. It was shown by the plaintiff that at the point where the accident occurred a foot path crossed the tracks, which for many years had been in daily use with the knowledge of the company's servants.

It was held that a mere permission or license from a railroad company to cross its tracks was not an invitation,

and "as the plaintiff was on the track without right, and there is no evidence of willful or reckless misconduct on the part of the defendant, the action cannot be maintained."

In *Mugford vs. B. & M. R. R. Co.* (Mass. Sup. Ct.; 52 N. E. Rep.. 1078) a boy 11½ years old was injured while stealing a ride on defendant's train. Held, that the plaintiff was guilty of a deliberate and intentional trespass, and consequently could not recover, except for wanton injury. This accident occurred in the city of East Boston, Massachusetts, and in the course of its opinion the court remarked that "the plaintiff cannot ask us to say that if a fence had been there it might have changed his purpose, and therefore that the absence of the fence is the cause of his misfortune."

In *McMahon vs. Nor. Cent'l R. Co.* (39 Md., 438) a child five years and nine months old, in attempting to pass under a car slowly moving along the street, was run over and seriously injured. *Held*, he was not entitled to recover damages from the company for the injury sustained, as his attempt to pass under the moving car was such an act of carelessness as amounted in law to contributory negligence; and so it was also held in *Schwier vs. N. Y., &c., R. R. Co.* (15 Hun., 572), where the boy injured was under four years old.

In *Ex parte Stell* (4 Hughes [U. S. C. C.], 157) the injured child was seen on the railroad track by the engineer of the approaching train and everything was done to stop the train, without success. Common brakes only were used. Held, there was no evidence of negligence on the part of the defendant company to submit to the jury.

In *Wendell vs. N. Y. Central & C. R. Co.* (91 N. Y., 420) plaintiff's intestate, seven years old, attempting to cross the track in front of a moving train, fell, and was struck by

the engine and killed. The case was submitted to the jury, who found for plaintiff. On appeal, held that contributory negligence had been shown and a nonsuit should have been entered.

In *Hestonville R'y Co. vs. Connell* (88 Pa. St., 520), where the injured child was but six years old, the court said:

"It may be assumed that a child old enough to be trusted to run at large, has wit enough to avoid ordinary danger, and so persons who have business on the streets may reasonably conclude that such an one will not voluntarily thrust himself under the feet of his horses or under the wheels of his carriage, *a fortiori*, may they conclude that they are not to provide against possible damages that may result to an infant from its own willful trespass."

And in *Cauley vs. Railway Co.* (95 Penna. St., 398), where the injured boy was but seven years old, it was said:

"It ought to be equally well understood that parents who permit their children to trespass upon the track of a railroad are guilty of negligence. It is not only gross but culpable negligence, as it imperils the lives of the children so trespassing, as also the lives of the traveling public. It too often happens that boys are allowed to trespass upon railroad tracks, and while so engaged injuries are likely to happen, and it would be unjust to compel a corporation or an individual to make a pecuniary compensation for such accident, when it was the result of a lawful pursuit of a lawful business by such corporation or individual. The father owes the child the duty of protection, the company does not."

In *B. & O. R. R. Co. vs. Schwindling* (101 Pa., 258) it appeared that a child of six years was injured while loitering upon the platform of a railway station. *Held*, that as the child was not a passenger and had no business with the company or its agents, he was a trespasser upon its property, and the fact that he was a child of tender years did not alter the duty of the railroad company to him in the

premises, and therefore render the company liable to him.

"It is entirely immaterial whether the person injured is an adult or a child; the company would owe the plaintiff no duty if he were an adult, how then can it be otherwise because he is a child?"

And referring to the earlier case of *Railroad Co. vs. Hummell (supra)*, the court further said:

"A jury cannot hold a party to a higher standard of duty than the law requires, and they cannot find anything negligence which is less than a failure to discharge a legal duty."

In the case of Nolan *vs.* Railway Co. (53 Conn., 461) it appears that two children, respectively seven and ten years of age, were injured while crossing the defendant company's tracks in the streets of a city at a place other than a regular street crossing. In disposing of the case the court said:

"A railroad company is under no obligation to locate its tracks and adjust the running of its trains with reference to the safety of persons unlawfully on its right of way, and is not required to fence its tracks against trespassers. Fences are required along its tracks to protect animals, not rational, intelligent beings.

"The tender age of the person injured can have no effect to *raise a duty* where none otherwise existed. Where certain duties exist, infants may require greater care than adults, but precautionary measures for the protection of the public must, as a rule, have reference to all classes alike (men, women, and children)."

This, then, was the state of the law when defendant's counsel, upon the entire evidence introduced at the trial, moved for a verdict. It cannot be denied that plaintiff was a trespasser upon the tracks of defendant; that he was injured while doing that which ordinary care and prudence forbade his doing, and at a place where he had no business

with the company and not the slightest right to be. There was not a scintilla of evidence tending to show that defendant's servants omitted doing anything that might have averted the accident and prevented the infliction of the injury after plaintiff's peril was apprehended.

This case is readily distinguishable from the case of Railroad Company *vs.* Gladmon (15 Wall., 401) and that of Railroad Company *vs.* Stout (17 Wall., 657), upon both of which plaintiff relies and the opinion and judgment of the Court of Appeals largely depend. In the former case, a child seven years old attempted to run across certain street railway tracks which were imbedded in and formed a part of a street in a populous portion of the city of Washington. He was injured by the horses of an approaching car, the driver of which was talking to a person standing beside him upon the platform, and for such purpose had turned himself "so as to look at a right angle to the course in which he was driving." The record before this court showed no testimony but that of one witness, who testified "that if the driver had not been looking at his companion he could have checked the horses in time to have prevented the accident."

Upon this state of facts the court submitted to the jury the question of the contributory negligence of the child, and the propriety of such action in cases presenting substantially similar conditions or facts is no longer open for discussion; but there is a wide difference between the attempt of a seven-year-old child to cross street railway tracks forming a portion of the general surface of the street roadway in front of an approaching horse car and the attempt of a thirteen-year-old boy in the performance of a man's duties to cross the elevated tracks of a steam railroad which formed no portion of the surface of the street roadway and were separated therefrom by a granite curb

eight inches in height, assuming that both attempts were made at other than recognized crossings.

In the Stout case, a child six years of age, wandering about in an aimless manner with two other boys nine and ten years of age respectively, came upon the defendant company's grounds near a traveled highway and not separated from adjoining properties by any visible barrier. It was proposed that they should play with a turn-table belonging to the company, which was on its own premises, but was unenclosed, not "guarded by any servant or agent, was not fastened or locked, and revolved easily on its axis." It appeared that children were in the habit of playing with the turn-table, and this fact was known to the company's servants. Plaintiff was injured, and it was held that in submitting the question of negligence on the part of the defendant railway company in the management or condition of its turn-table to the jury the charge complained of was correct, this court saying:

"It is well settled that the conduct of an *infant of tender years* is not to be judged by the same rule which governs that of an adult." * * *

"That the turn-table was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred to the plaintiff, * * * and the jury were justified in believing that children would probably resort to it, and that the defendant should have anticipated that such would be the case."

But in the case at bar no such question nor any akin thereto arises. Here the plaintiff, so far from being of *tender years*, was approaching man's estate and doing a man's work. There was nothing about the company's tracks at that point to attract the plaintiff or others to play thereon or to arouse their curiosity. His sole purpose in going upon the tracks was to serve his own convenience and shorten his hours of labor. It was not to be presumed that a boy

twelve years old would thrust himself in front of an advancing train, his view of its near approach being unobstructed had he used his sense of sight. He was a trespasser, pure and simple, using the company's tracks for his own purposes and convenience. His injuries were the result of his own rashness for which the company should not be mulcted in damages.

It is submitted, therefore, that the refusal to instruct the jury to return a verdict and afterwards the further refusal to grant defendant's second prayer for instructions were both erroneous and constitute reversible error.

For like reasons, also, the granting of plaintiff's second prayer for instruction was obnoxious to law and prejudicial to defendant's rights.

II.

The variance between the declaration and the proof with respect to the light on the advancing end of the train was material and, under the law, should have resulted in a nonsuit.

The declaration avers that "there was *no* light upon the rear part of said engine to indicate its approach," and "that by reason of the reckless and grossly careless manner in which the agents of said defendant operated said engine, *in failing to place* ANY *light upon the rear part of said engine*, which was being backed along said Maryland avenue in the direction of the plaintiff, so as to indicate the approach of said engine plaintiff was injured."

It seems certain that these two averments of the declaration were intended to and do assert that the absence of *any* light on the advancing end of the tender was an element of the defendant's alleged negligence which was relied upon

The language used is simple and plain and hardly susceptible of the restricted character with which the Court of Appeals invested it.

The testimony of Faunce and of the defendant's witnesses shows that there was a signal lantern hanging on a hook on the rear or advancing end of the tender. Faunce, plaintiff's witness, testifies he first saw this light on the tender when the engine was coming across the bridge *about 200 feet away*, and also testified that he had never seen any other kind of a light on the rear of the tender of a backing engine nor one that gave a brighter light (17). Phillips, the gate tender at 13½ street, testified that he saw the light on the work-train a half a mile away (28), and Maddox, the fireman, testified that when the train came to a stop he went to the back end of the tender and saw that the lamp was burning (23).

This testimony was uncontradicted. It clearly shows not only that there was a light on the rear of the tender, but that it was burning and of sufficient brilliancy to indicate the approach of the train for a long distance. It was therefore error in the trial court to refuse to give the defendant's fourth and sixth prayers.

III.

Plaintiff's first prayer, which was granted and read to the jury, was improper in form, erroneous in law, and inapplicable to the facts disclosed by the evidence.

The prayer is as follows:

"1. The jury are instructed that if they find that the injuries received by the plaintiff on the evening of the 10th of December, 1894, by being run over by a locomotive on the defendant's railroad track on Maryland avenue, in the city of Washington, were caused by negligence of some

person or persons in the employ of the defendant company, then the plaintiff is entitled to a verdict, unless the jury further find from the evidence that the plaintiff's own negligence contributed to the injury; and in determining whether the injury was caused by the negligence of the defendant's employés or any of them, the jury have a right to take into consideration the FACTS (1) that the railroad tracks at the point where the accident occurred were not protected by a fence, as required by the regulation of the District Commissioners, which is in evidence; (2) whether the light at the front end of the train was substantially such a light as required by the regulation of the District Commissioners, given in evidence, or such a light as was requisite to give proper warning of the approach of the train; (3) the distance passed over by the train after it struck the plaintiff before it was brought to a stop; and (4) all the evidence in the case tending to show whether or not the persons in charge of the engine drawing the train were keeping a proper lookout, and the jury will consider all the evidence in the case bearing upon these questions."

Plaintiff's declaration contained three charges of negligence against the defendant company, to wit:

1. That the engine was being backed along the track at the place where the plaintiff was injured, and that there was NO LIGHT on the rear of the engine to indicate its approach.

2. That there was no signal of the coming of the said engine given by the said defendant.

3. That there was no gate or fence erected alongside of the tracks at the place where the accident occurred.

The instruction complained of informed the jury that they "have a right" to take into consideration the FACTS (1) that the railroad tracks at the point where the accident occurred were not protected by a fence *as required by the regulation* of the District Commissioners in evidence.

It is to be remarked, in reference to this, that the regulation referred to does not *require* a fence at this place. The regulation is in the following words (18):

"Whenever the grade of a steam railroad track is *approximately even* with the adjacent surface, the line of the road shall be securely closed, on both sides, with a substantial fence."

The testimony shows that the grade of the railroad track where this accident happened was not *approximately even* with the adjacent street, but on the contrary that the track *was two feet two inches higher than the street* (20). The plaintiff, therefore, was obliged to climb up this height in order to get upon the track, and it is submitted that this portion of the instruction constitutes reversible error, inasmuch as it asserts as matter of *fact and law* that the tracks were not fenced, though so required to be by the police regulations of the District.

If the matter of the presence or absence of fences was a proper subject for the consideration of the jury, that body should have been permitted to take into consideration that no particular kind of fence, except that it must be substantial, is specified by the regulation, and the evidence showed that the defendant's tracks at this point were separated from the roadway by substantial curbs sunk into the roadway and projecting eight inches above the same.

The second subdivision of the instruction authorizes the jury to determine whether or not the light at the front end of the tender was substantially such a light as is required by the regulation of the Commissioners given in evidence, or whether it was such a light as was requisite to give *proper warning* of the approach of the train. This was not in conformity with the pleadings. The declaration alleges in more than one place that there was *no light* on the rear end

of the tender, which was at the front of the train. The plaintiff should have been confined to the averments of his declaration, and, having alleged that there was *no light*, he should not have been permitted to prove that the defendant was guilty of negligence, not because it carried *no light*, but because the light it did carry was *insufficient*. Furthermore, the question whether the light carried was a sufficient light or such an one as was necessary to give proper warning of the approach of the train was a question of law and not a question of fact. In any event, before the jury should have been allowed to pass upon the question, it was necessary that there should have been some competent evidence offered upon that subject. The testimony of men experienced in such business might have tended to throw *light* upon the question, but a jury cannot know intuitively whether a particular kind of lamp is sufficient or insufficient for such purpose. If such questions are to be submitted to jurors, one jury might well determine that a given style of lamp is sufficient, and another jury, sitting in the same court on the same day and trying the same state of facts in another cause, might find to the contrary. The futility of submitting such questions to juries and the rule against such course is well illustrated by the following cases:

Delaware R. R. Co. *vs.* Converse, 139 U. S., 469, 473.
R. R. Co. *vs.* Ives, 144 U. S., 427–428.
B. & P. R. R. *vs.* Springman, 5 Mackey, 1.
B. & P. R. R. Co. *vs.* Golway, 6 App. D. C., 143.
Eck. R. R. Co. *vs.* Hunter, 6 App. D. C., 287.
B. & O. R. R. Co. *vs.* Adams, 10 App. D. C., 97.
Dyer *vs.* R. R. Co., 71 N. Y., 228.
Beisegle *vs.* R. R. Co., 40 N. Y., 9.
State *vs.* P., W. & B. R. R. Co., 47 Md., 76, 85.
Haas *vs.* R. R. Co., 47 Mich., 401, 406.

The third subdivision of this remarkable prayer and instruction authorized the jury, on the question of defendant's negligence, to consider "the distance passed over by the train after it struck the plaintiff before it was brought to a stop." It is difficult to see the application of this subdivision to the evidence in the present case. It was applicable and proper upon the evidence in the Ives case (144 U. S., 427), whence plaintiff's attorneys apparently derived it. There an experienced engineer was called to testify as to the probable rate of speed at which the train was moving judging from the distance the train ran after the accident had taken place. In the present case there was no testimony upon the subject from the plaintiff, but defendant's engineer testified that after the accident he thought the train moved about 90 feet. The testimony concurred in establishing the fact that the plaintiff was found at or near the nose of the pilot of the engine, which indicated that the tender of the engine, the engine, and the pilot all passed over the plaintiff, and the distance the train moved after the boy was struck, therefore, was the length of the engine, tender, and pilot taken together. This instruction could have had no less harmful effect upon the jury than to at least produce confusion in their minds and lead them to suppose that it was an important consideration in the case, and this necessarily to the prejudice of the defendant.

The testimony shows that the train was moving upgrade and that it was moving at a rate of speed not more than 12 miles and not less than 8 miles an hour. There is no averment in the declaration that the train was moving at a higher rate of speed than was reasonable and consistent with the regulation and of the safety of the people who might be in the vicinity.

It is evident that when this instruction was drafted counsel for plaintiff had before him the case of The Railway

Company *vs.* Ives, 144 U. S., 427, 428, but it is difficult to understand how any parallel can be drawn between that case and the present. In that case the *crossing* where the accident occurred was in a thickly populated part of a large city. There were various obstructions of the line of vision in both directions, and the proof showed that the train was moving at an extraordinary rate of speed. There were other circumstances indicating negligence on the part of the defendant company. In the case at bar the plaintiff attempted to cross the tracks midway between 13½ and 14th streets, at a place where people were not accustomed to cross, and where it was difficult to cross, because the tracks were greatly elevated above the level of the street. Before the plaintiff could get upon the railroad track it was necessary for him to mount upwards a distance of two feet two inches (20). At the crossing on 13½ street, where people were expected to cross, there was a plain unobstructed and convenient passage for pedestrians, except when trains were about to pass, when the gates were closed, and they were actually closed at the time of this accident. If plaintiff had proceeded to either of the neighboring street crossings for the purpose of crossing the tracks, as he should have done, he would have been met by the closed gates, and would doubtless have thus been spared all injury. The proof shows that the train was moving at the rate of from 8 to 12 miles an hour. One of the defendant's witnesses says that it was moving between 8 and 10 miles an hour. But the engineman and fireman put it at 8 miles an hour. Only one of the witnesses for the plaintiff said anything about the rate of speed, and he said the train was moving at the rate of 12 or 15 miles an hour, this evidently being a mere guess on his part. The maximum rate of speed, fixed by the regulation of the Commissioners of the District for the movement of steam railroad locomotives in the streets of Washington, was at that time, and is now, 12 miles an hour. There

was no *evidence* that the train was moving at a greater rate of speed than 12 miles an hour. In the Ives case the court declares that there was evidence that the ordinary signals of blowing the whistle and ringing the bell at the crossing were not given, and that the train was running at a more rapid rate of speed than was permitted by the city ordinance. There is no evidence in this case that the men on the engine were not ringing the bell. The plaintiff says that he heard neither whistle nor bell; he also testifies that he did not see the train that injured him. But just as the train in fact was in plain view although he did not see it, so the engine bell was rung, though he may not have heard it. The men on the engine and other witnesses for the defendant who were in the vicinity of the accident testified positively that the bell was ringing from the time the train left the bridge to the time of the accident.

Paragraph numbered 4 of this instruction informs the jury that they may consider "all the evidence in the case tending to show whether or not the persons in charge of the engine drawing the train were keeping a *proper lookout*." This is also from the case of The Railway Company *vs.* Ives, 144 U. S., 420. The language of the trial court used in that case is as follows:

"So, if you find that the train hands kept no proper lookout, managed the train without due caution and reasonable care, you will be authorized to infer negligence on the part of the company as one of the facts established in the case."

In referring to the language of the trial court in that case and the claim of counsel, based thereon, that the instruction was erroneous because there was no evidence that the train hands had kept no proper lookout, etc., this court said:

"This contention is also without merit. There was evidence that the ordinary signals of blowing the whistle and ringing the bell at the crossing were not given, and that the

train was running at a more rapid rate than was permitted by the city ordinance. If the jury believed that evidence they must necessarily have found that the trainmen did not keep a proper lookout, and did not manage the train in a prudent and careful manner."

It seems plain that the trial court committed error in the case at bar when the jury were instructed that they might consider whether the persons in charge of the engine drawing the train were keeping a *proper lookout*, for there was no evidence here, as there was in the Ives case, to authorize the court to give the jury any such instruction. The engineer swears that he was at his proper place looking ahead; the fireman also swears that he was at his proper place looking ahead. They both saw the plaintiff, and as soon as they suspected that he might walk upon the track, took such precautions as were necessary and proper under the circumstances. Faunce, the stand-by witness for the plaintiff, says he did not see either the engine-man or the fireman, but there was no evidence competent to go to the jury tending to show that the men on the engine were not keeping "a proper lookout."

The Court of Appeals, in passing upon this instruction, said (18):

"To this instruction exception was taken, on the ground that it was not based upon any sufficient testimony in the case, and that it was, in part at least, inconsistent with the allegations of the declaration. That the instruction is inaptly drawn, is loose in its phraseology and grammatical construction, and is perhaps to some extent misleading, seems to be quite clear; and if it stood alone, there might be grave question whether it would not warrant a reversal of the judgment. It refers to certain suggestions for consideration as being *facts*, when only one of the matters suggested could, with any propriety of language, be so characterized; and even that one seems to assume that the failure of the railroad company to construct a fence at the place of

the accident was an act of negligence *per se*, without reference to the question of its practicability or to the question whether the relation of the tracks at that place to the adjoining surface of the roadway justified the application thereto of the ordinance in regard to fencing. But the instruction does not stand alone; it was given to the jury by the court with an explanation so clear and ample as to leave no doubt of its meaning. The court informed the jury that they were not to understand from the instruction that the mere failure to keep a fence at this point should be regarded as being *per se* an act of negligence; but that it was for the jury to determine, under all the circumstances of the case, whether it was practicable and proper to have a fence at that point. Similarly in regard to the signal light upon the engine, the jury were told that the failure of the company to provide such a light for the engine as was required by the regulation of the Commissioners would not be an act of negligence, if the light that was there was a proper and sufficient one to give warning of the approach of the train. The instruction so construed and explained, was as favorable to the defendant as it could reasonably expect."

So far from relieving the vice of this instruction, it seems to us that the explanatory sentences and phrases of the general charge (*ante*, p. 9) but served to increase the difficulty and intensify its ambiguity. The prayer and the explanatory sentences together might well tend to confuse men of more than average jury intelligence. That it operated to the wrongful prejudice of the defendant can hardly be doubted.

It is the settled doctrine of this court that "while it is a sound principle that no judgment should be reversed on error when the error complained of worked no injury to the party against whom the ruling was made, *it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the right of the party.* The case must be such that this court is not called on to decide upon the

preponderance of evidence that the verdict was right, notwithstanding the error complained of."

Smiths *vs.* Shoemaker, 17 Wall., 639.
Deery *vs.* Cray, 5 Wall., 795.
Moores *vs.* Nat. Bank, 104 U. S., 630.
Gilman *vs.* Higby, 110 U. S., 47, 50.
Vicksburg, &c., R. R. *vs.* O'Brien, 119 U. S., 99, 103.

Who can say from an examination of the record in this case that *it appears beyond doubt* that the jury was not influenced to the prejudice of the defendant by this instruction? Can this court say that it *appears perfectly clear* that the jury were not misled by the various manifest errors that were embodied within it?

Upon the whole case, the judgment of the Court of Appeals should be reversed and the cause remanded to that court with instructions to reverse the judgment of the supreme court of the District of Columbia and remand the cause to that court for further proceedings to be had therein in accordance with law and justice.

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